

**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**

TECHNICAL TESTIMONY OF BRIAN SHIELDS

I. QUALIFICATIONS AND BACKGROUND

I am the Executive Director of Amigos Bravos, Inc., a New Mexico statewide non-profit river conservation organization. I have served as a founding member of the Board of Directors from 1988-1990, as Projects Director from 1991-1996, and as Executive Director since 1996. Established in 1988, Amigos Bravos is an award-winning, nationally recognized river and water conservation organization with offices in Taos and Albuquerque, a staff of six, and a membership of over 1,600 supporters. Rooted in both science and the law, and inspired by the traditional values and wisdom of New Mexico's diverse communities, Amigos Bravos is guided by social justice principles and dedicated to preserving and restoring the ecological and cultural integrity of New Mexico's rivers and watersheds.

Amigos Bravos has played a leading role in reducing water contamination emanating from the Chevron Mining, Inc. molybdenum mine in Questa, preserving the Valle Vidal, holding Los Alamos National Laboratory accountable for its toxic legacy, restoring the Red River, reforming mining practices statewide, and bringing river otters back to New Mexico. Our members are located throughout the state and they are affected by water issues all over the state. Specifically, we have numerous family and business members in Grant and Sierra Counties who live near the area where the copper mines are located. Currently, the copper facilities have contaminated groundwater in Grant County and these draft rules affect Amigos Bravos members by allowing for the contamination of potential future sources of drinking water.

In response to severe impacts to New Mexico's limited water resources, and the lack of comprehensive mining reform at the federal level, mining activists, including Amigos Bravos, were successful in passing the 1993 New Mexico Mining Act. The Act contains strict requirements regarding the location of new mines, and a strong mandate for the reclamation of existing and new mines. I was involved in the legislative process through which the New Mexico Mining Act was adopted. Since the passage of the New Mexico Mining Act of 1993, I have been involved in numerous regulatory proceedings regarding the development of closure plans and financial assurance requirements at the Chevron molybdenum mine in Questa, New Mexico. I have also been involved in numerous groundwater permit hearings also related to the Chevron mine. As leader of a membership based advocacy organization I have first-hand experience with navigating public notice requirements. In service to our membership I often serve as a conduit of information when public notice requirements are lacking. In this capacity I have unique experience to provide testimony on the adequacy of public notice components of

regulatory actions. In addition I have directed Amigos Bravos' efforts to educate decision makers about the importance of Low Impact Development and Green Infrastructure in protecting water quality in New Mexico.

II. AMIGOS BRAVOS EXHIBITS 1 AND 2

Amigos Bravos' Exhibit 1 ("AB Exhibit 1") contains our recommended modifications to the Department's proposed copper rule attached to the October 30, 2012 petition. We think it is important to show the Commission the many provisions Amigos Bravos supported in the August 17, 2012 draft copper rule that were presented to the Copper Rule Advisory Committee by the Department's technical staff and consultants, and were then changed after the Advisory Committee was disbanded. In Exhibit 1, Amigos Bravos proposes numerous modifications based on language that was proposed by Department staff and consultants during the Advisory Committee process. These changes come from the last draft presented to the committee by the Department on August 17, 2012. This language was supported by Department's team of technical experts after input from the Copper Rule Technical and Advisory Committees during numerous meetings. We propose to reinstate this language into the proposed rule and formally submit this language as the red text in AB Exhibit 1, also identified by a notation of "(8/17 draft)" to help track these proposed modifications in black and white copies. Each proposed modification tracks the exact language that was proposed in the 8/17 draft. To summarize these modifications Amigos Bravos has prepared a bulleted list submitted here as "AB Exhibit 2."

AB Exhibit 1 also includes Amigos Bravos recommended new modifications that we propose in this hearing. The modifications in AB Exhibit 1 that represent new language are marked in blue in the color copy and are bold underlined **without** the "8/17 draft" notation.

III. GREEN INFRASTRUCTURE/LOW IMPACT DEVELOPMENT

This testimony addresses proposed language on pages 4, 22 and 58 in AB Exhibit 1 (**in bold underline**).

Amigos Bravos is proposing Green Infrastructure and Low Impact Development (GI/LID) technologies, which have in recent years been embraced by a wide range of regulatory oversight agencies and bodies. EPA in particular has incorporated GI/LID into their approach to controlling stormwater discharges citing numerous benefits, both economic and ecological. See <http://water.epa.gov/polwaste/green/index.cfm>. The October 30, 2012 draft copper rule sets out guidelines for controlling stormwater in numerous sections. Amigos Bravos believes that it is therefore appropriate that the new rule encourage – even if it does not mandate – what EPA considers to be the best available technology for controlling stormwater runoff. We therefore recommend including in the rules definitions for Green Infrastructure and Low Impact Development, as well as language to encourage copper companies to consider GI/LID stormwater controls. Generally GI/LID concepts focus on slowing down stormwater before it picks up more sediment and pollution. This often entails controlling stormwater close to its

source, usually in numerous small management measures, instead of directing all stormwater in a high velocity manner to one centralized location. By adopting simple language encouraging, **but not requiring** the copper industry to consider LID/GI approaches, the Water Quality Control Commission would be in-line with the national trend towards embracing these concepts.

Another component of LID/GI is to mimic natural processes. For example ponds with constructed wetland components can greatly aid in active treatment of stormwater contaminants. In a review by ECONorthwest (www.econw.com), *The Economics of Low-Impact Development: A Literature Review*, (“AB Exhibit 3”) evidence is presented that LID can offer cost-savings when compared to conventional stormwater controls. ECONorthwest’s review also finds that LID provides valuable ecosystem benefits, such as water filtration and purification, which conventional stormwater controls do not. Amigos Bravos’ recommended modification does not impose a strict requirement to implement the GI/LID technologies; instead the suggested language merely encourages consideration of these contemporary approaches to controlling stormwater. As a decision making body with a primary duty to prevent water pollution, encouraging the consideration of the most effective water quality control management measures is appropriate.

IV. PUBLIC NOTICE

This testimony addresses proposed language on pages 10 and 14 in AB Exhibit 1 (**in bold underline**) and specifically on proposed language in four sections of the proposed rule, Sections 20.6.7.11.F, 20.6.7.14.E, 20.6.7.15 and 20.6.7.16.

Section 20.6.7.11.F and 20.6.7.15 – The Department’s proposed public notice language is confusing and incomplete. The Department’s proposed rule only mentions “public notice preparation” and requires that the applicant describe how it will meet public notice requirements. The Department’s proposed rule does not explicitly state anywhere what those public notice requirements actually are. Amigos Bravos proposal does both – it requires the applicant to outline how it is going to meet public notice requirements, in Section 20.6.7.11.F, **AND** the Amigos Bravos proposal specifically states what those requirements are in Section 20.6.7.15. Amigos Bravos’ proposed language provides clarity for both the applicant and the public about the required public notice requirements. In addition, the language that the Department does include on public notice, in 20.6.7.11.F, implies that public notice requirements are less than what is required by WQCC regulations, for example no mailing to nearby landowners is required. This is certainly not appropriate for copper mining facilities which are typically much larger and have much larger impacts to the local resources than most facilities covered by other types of discharge permits.

Amigos Bravos’ recommended modification for 20.6.7.11.F (application requirements) replaces the Department’s proposed language by requesting a description of how the applicant is going to comply with required public notice requirements and cites where these public notice requirements are listed. These required public notice requirements are then clearly stated in Amigos Bravos proposed section 20.6.7.15.

The Department in its proposed language for 20.6.7.11.F essentially establishes a separate public notice rule for the copper mining industry that is less stringent than for other industries. In addition, the Department's proposed language is confusing, duplicative, and insufficient. It is not necessary to reinvent the wheel through the proposed copper rule. Moreover, it is more straight-forward and efficient for all when there is a consistent public notice process applicable to all groundwater discharge permits. The Water Quality Act outlines public notice requirements and where those public notice requirements are lacking, additional requirements have been outlined in section 20.6.7.15 NMAC and referenced in this section, 20.6.7.11.F NMAC.

Amigos Bravos proposes to remedy the public notice requirement confusion by clearly stating public notice requirements in a separate section, Section 20.6.7.15. This section proposed by Amigos Bravos, clearly states that current WQCC public notice requirements in 20.6.2.3108 NMAC apply. Two additional requirements are outlined in Amigos Bravos proposed modifications. These are the requirement to include a copy of the facility location map in the mailed notice to nearby property owners, and to require that this mailed notice be sent to property owners within 1 mile, instead of 1/3 of mile, of the proposed discharge. These additional public notice requirements were included in the 8/17/12 Advisory Committee draft but have since been removed from the Department's October 30, 2012 petition.

As Executive Director of Amigos Bravos I have reviewed and commented on many draft water quality permits and assisted others in reviewing and commenting on draft permits. The WQCC's public notice requirements in 20.6.2.3108 NMAC are clear, comprehensive and familiar to the public and to the regulated community. It is appropriate to apply these public notice requirements to copper facilities. In addition, having a copy of a map that outlines the key features of the landscape in relation to the proposed discharge would greatly increase the ability of the public to participate meaningfully in the process. Oftentimes it is hard to understand the potential impact of a proposed discharge unless the public can picture exactly where the discharge will be located. Knowing the location of where the facility is proposing to discharge in relation to key features on the landscape such as watercourses, public drinking water wells, irrigation systems, etc. will help the public identify how the proposed discharge will impact them personally. For example, having a contoured map would help an individual identify if the proposed discharge is located near a watercourse that then passes by their property or by a favorite fishing spot. From my experience in working with the public, and in my own experience in reviewing proposed discharges, providing the public with a copy of a facility location map during the public notice process would greatly increase public understanding of, and participation in, the permitting process. It is important to note that this is a requirement the Commission appropriately included in the new dairy rules 20.6.6 NMAC. Copper mines are usually large scale operations disturbing many many acres of land. This disturbance can be seen and felt from far distances. It is appropriate that mailed notice be sent to property owners within a mile of the facility rather than just 1/3 a mile that is required in 20.6.2.3108 NMAC, or no mailing requirement to property owners whatsoever, which is currently proposed by the Department.

Section 20.6.7.14.E - Amigos Bravos' proposed modification for Section 20.6.7.14 would ensure that the interested public would receive notice of permitting decisions. This requirement would only require notice be given to members of the public that have specifically requested to receive notice. As a statewide organization dedicated to clean water, Amigos Bravos believes that this requirement would greatly increase the public's ability to track decisions that impact water quality and public health.

Section 20.6.7.16 - This section enables the public to request a hearing on a permit application. This is an appropriate provision given that these copper facilities are typically massive in scale and have wide reaching impacts on local communities and resources. It is appropriate for the public to have the ability to request a hearing on permitting actions. This language was included in the August 17, 2012 Advisory Committee draft but has since been removed in the subsequent Department's petition.

V. BAD ACTOR PROVISIONS

This testimony addresses proposed language on page 13 in AB Exhibit 1 (**in bold underline**).

The bad actor provisions are in the Water Quality Act at NMSA 1978, §74-6-5.E and are required to be enforced by the Department. Amigos Bravos recommends that the information required to determine whether an applicant is a bad actor be submitted as part of the application process. Bad actor disclosure provisions will help the state identify repeat violators of environmental laws. Similar disclosure requirements have become standard in state environmental laws. *See*, NMSA 1978, §74-4-4.2.D Hazardous Waste Act and NMSA 1978, §74-9-24.B Solid Waste Act. Before issuing a permit the state should have all relevant information about the applicant, including past compliance history and status. In issuing a groundwater permit the state is trusting that the applicant will follow all applicable rules and regulations to protect the state's groundwater, a vital resource to the state's economy and wellbeing. The state must be aware of the risk of regulating an applicant that has a history of disregarding the law, especially if the laws violated are environmental statutes and rules. This information is essential for sound decision-making by the Secretary of the Environment Department when making a determination of whether or not issuing a proposed permit is a "hazard to public health" or an "undue risk to property." 20.6.2.3109.C NMAC. In addition, the public has the right to know if one of the public's most valuable resources – the state's groundwater - is being entrusted to an entity that has a history of breaking the public trust. As the head of a public interest organization focused on protecting water quality, this is certainly information that is relevant and I believe that it is in the public interest to require this information before trusting an entity with our state's water.

In the past, NMED has advocated for bad actor provisions to be included in state law stating that "resources required to address permit holders that have a willful disregard for environmental laws is burdensome to the agency and limits the ability of the agency to address other environmental issues." *See* AB Exhibit 4, Fiscal Impact Report SB115, 2010 Session. Both NMED and the Attorney General's Office found that bad actor

provisions in regulations would be beneficial. Indeed, NMED has stated that increased staff time related to reviewing disclosures required under bad actor requirements would be more than offset by the reduced resources currently spent in pursuing compliance through legal means. AB Exhibit 4. Besides, it is the law. Section 74-6-5.E requires the constituent agency to deny an application for a discharge permit if the applicant has knowingly misrepresented a material fact in an application or exhibited a history of willful disregard for environmental laws of any state or the United States. How will the Secretary be able to make a sound decision if this information is not provided in the application?

NMED has contended in the past that a history of previous environmental transgressions would make it likely that a permit applicant would disregard environmental requirements in the future, and that this would create “a tremendous burden on agency resources by requiring continued enforcement oversight and legal action in addition to the adverse impacts to public health and the environment in New Mexico.” AB Exhibit 4. In addition NMED has stated that “[c]ontinuous noncompliance can lead to situations that significantly endanger public health and the environment.” AB Exhibit 4.

In summary, by NMED’s own admittance, requiring information about past compliance history will help NMED and the Commission better protect our groundwater for future generations. NMED should not be burdened with having to collect information on the applicant’s prior environmental compliance records. Therefore the applicant should be required to provide that information upfront as part of the permitting process.

VI. VALUE OF GROUNDWATER IN NEW MEXICO

While the focus of New Mexico’s water issues centers on having an adequate supply, water quality is also very important. Preventing water contamination is financially more practical and efficient than conducting expensive clean-up programs. As the population of New Mexico grows and the drought intensifies, groundwater sources are tapped with increasing urgency.

The public owns all water, including groundwater, in New Mexico, with the right to use water established by state law. New Mexico currently relies on groundwater for 50% of its water demand. *Groundwater in New Mexico* (2012), Darcy Bushnell, Esq., *Water Matters! 2013*, Utton Transboundary Resources Center. Drought and population growth have been a driving factor in development of groundwater resources. *Id.* The result has been dramatic declines in water tables, classified as “mining” – withdrawing more groundwater than natural recharge can replace. Mining water has increased in New Mexico at an alarming rate. For example according to the Utton Transboundary Resource Center, there has been a drop in groundwater of as much as 180 feet in the Albuquerque Basin. *Id.*

As a result all water is important. All water, everywhere, should be regarded as a “place of withdrawal of water for present and reasonably foreseeable future use”. NMSA 1978, §74-6-5.E(3). Once we accept the reality that all water, everywhere, is a place of

withdrawal for the foreseeable future, it must become a matter of public policy that all state agencies have an obligation, to the extent that their role and decisions have an impact on water in the state, to ensure that all water, everywhere, is protected.

NMED's proposed Copper Rules will allow pollution above standards inside of a designated ring of monitoring wells. This allowance of contamination institutionalizes an illegal "sacrifice zone," that, contrary to law, will allow pollution above standards in certain areas at every new and existing copper mine. It is important to note that these regulations are precedent setting. Other industries that discharge contaminants will look to what is allowed at copper mines and will request equal treatment. What criteria will the Commission use to deny other discharges the same treatment? If pollution to groundwater is allowed by rule, the entire purpose of the Water Quality Act – to prevent and abate water pollution – will be meaningless. The future of New Mexico's waters, and the health of future generations, is in the hands of this Commission.

I pray that you make the right decisions!